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RECENT AMERICAN DECISIONS.

Supreme Court of Rhode Island.

CLARKE *v.* DELAWARE AND HUDSON RIVER RAILWAY CO.

An action in the state courts may be removed into the courts of the United States, under the Act of Congress of 1867, c. 196, at any time before the final trial in such action; and a trial before the jury and failure to agree upon a verdict, is not to be regarded as such a final trial.

THIS action was tried before a jury in this court and the jury disagreed. The defendants then filed a motion with the proper papers to remove the case to the United States Circuit Court under the Acts of Congress of July 27th 1866, and the amendatory Act of March 2d 1867. (14 U. S. Statutes, 306 and 558.)

The plaintiff opposed the motion on the ground that it was too late, as a trial had taken place in the state court.

The opinion of the court was delivered by

POTTER, J.—The Act of 1866 provides for removal of a suit at any time "before the trial or final hearing." The Act of 1867 varies the language somewhat; and provides for removal at any time "before the final hearing or trial."

We have been referred to the recent decision of the Supreme Court of Massachusetts in the case of *Galpin* v. *Critchlow* (*ante* p. 137), where the circumstances were similar to those of the case before us. There had been one trial resulting in a disagreement of the jury; and that court decided that the cause could not be removed. We cannot acquiesce in the reasoning or the conclusion in that case. And we think the weight of argument and authority is decidedly in favor of the right to remove.

With the policy of the Acts of Congress, we as a court, whatever our individual opinions, have nothing to do. Their effect no doubt is to carry into the United States courts a great mass of litigation, which would otherwise remain in the state courts.

The Act of 1867 has been decided not to be unconstitutional by the United States Supreme Court in 1872, in the case of the *Chicago & North Western Railway Co.* v. *Whitton*, 13 Wallace 270. See also *Fields* v. *Lamb*, 1 Deady 430.

Upon the construction of the act we must, however, decide. This indeed seems to be a mere form on our part, as in two cases, *Hazard et al.* v. *Durant et al.*, 9 R. I., and *Ellis* v. *Pope et al.*, not yet reported, where this court decided there was no ground for removal, the United States Circuit Court nevertheless took immediate jurisdiction of them. See also *Chicago &c., Railway Co.* v. *Whiton*, 25 Wisconsin 274; s. c. in 13 Wallace 270, and *Ackerly* v. *Vilas*, in the Supreme Court of Wisconsin, 8 Am. Law Reg. N. S. 558, and s. c. before MILLER, U. S. District Judge, 8 Am. Law Reg. N. S. 229.

It might be desirable that some mode should be provided by which questions relating to the construction of these acts, involving possible conflict of jurisdiction, might even before a trial upon the merits of a cause be taken to the United States Supreme Court for their decision. Congress, however, have made no provision for it. In one case, indeed, where the state court refused the removal and proceeded immediately to trial, the suit was removed to the United States Supreme Court by writ of error.

Our conclusion is that an order should be entered that this court will proceed no further in the cause. And we are clearly of opinion that the amendments made to the declaration should be considered as made as of the time when the declaration was filed. But if the cause is to be removed, it should be removed as of the date when the motion for removal was made. And the papers should be certified as they were at that date.

The foregoing opinion, taking the opposite view from that maintained by the Supreme Judicial Court of Massachusetts, in *Gilpin* v. *Critchlow*, ante p. 137, *et seq.*, will be of interest. We are not surprised at the result to which the court came in this case, since it seems to us to follow the natural import of the words of the statute, and to be sufficiently in keeping with the general spirit of congressional legislation, upon this and kindred subjects, since our unfortunate civil war, not to excite any surprise. The argument of Chief Justice GRAY in the Massachusetts case, conceived, as it is, in the most beautiful spirit of judicial courtesy, in attempting to make the provisions of the act conform to a decent and proper respect in Congress for the fairness and justice of proceedings in the state courts, does not, as our note to the case sufficiently intimated, quite come up to the legislative spirit of Congress upon matters affecting judicial proceedings in the states lately in rebellion, and we should be surprised, if the national Supreme Court did not feel compelled to adopt the construction here put upon the act.

I. F. R.